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Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

VALERIA DAVE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Texas obscenity statutes violate the individual right to privately access and view obscene materials guaranteed by substantive due process?

2. Whether the Court's previous determinations that the right to privately possess obscenity generates no corollary right to distribute obscenity are valid in light of the Court's emerging understanding of privacy?

3. Whether *Lawrence v. Texas*, 539 U.S. 558 (2003), eliminates states' abilities to criminalize the distribution of obscenity based solely upon concerns for public morality?

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OPINIONS BELOW

The decision of the Texas Court of Criminal Appeals denying discretionary review is unreported, as is the decision of the Texas Court of Appeals. App. 1a, 4a. Similarly, the trial court's ruling denying Petitioner Valeria Dave's petition for writ of habeas corpus is unreported. App. 17a.

JURISDICTION

The decision of the Texas Court of Criminal Appeals was issued on June 20, 2007. The Court has jurisdiction under 28 U.S.C. § 1257(a) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law." This case also involves the Texas obscenity statutes, Texas Penal Code §§ 43.21, 43.22, and 43.23, which are reprinted at App. 21-25a.

STATEMENT OF THE CASE

Petitioner Valeria Dave is an employee at Dreamer's, an adult retail boutique located in Kennedale, Texas. Dreamer's restricts admission to those 18 and older and offers no on-site entertainment. Dreamer's customers must instead view the material they purchase off-premises in the privacy of their own homes. App. 4a.

In 2006, undercover police officers purchased two sexually explicit videotapes from Dave while she was working

at Dreamer's. App. 5a. She was later charged with two counts of promoting obscenity under Texas Penal Code § 43.23. *Id.* Dave filed a petition for writ of habeas corpus, requesting that the trial court dismiss the charges against her on the grounds that the Texas obscenity statutes violate the substantive due process rights of her customers. App. 17a. In her motion, Dave largely relied on the principle announced in *Stanley v. Georgia*, 394 U.S. 557 (1969), and reinforced in *Lawrence v. Texas*, 539 U.S. 558 (2003), that the government cannot criminalize private sexual conduct. The trial court denied the petition. *Id.* Dave then appealed to the Texas Court of Appeals for the Fort Worth Division. App.4a. On February 22, 2007, the court upheld the decision of the trial court, ruling that "there is no constitutionally-protected right, under either the First or the Fourteenth Amendment, to sell obscene material, and that the State has a legitimate interest in regulating commerce in obscene material." App. 14-15a.

Dave next filed a petition for discretionary review with the Texas Court of Criminal Appeals. On June 20, 2007, the petition was denied. App. 1a. Dave now seeks to invoke this Court's discretionary review to resolve the important question of whether the Texas statutes criminalizing the distribution of obscene material for wholly private, in-home consumption violate the Fourteenth Amendment substantive due process guarantee.

REASONS FOR GRANTING THE WRIT

I. The Prosecution of Valeria Dave Endangers Texas Consumers' Fundamental Right of Privacy.

A. The Court's emerging view of privacy extends to protect public transactions of sexually oriented material that is consumed in private.

It is well-established that the Constitution protects the right to receive information and ideas. *See, e.g., Stanley*, 394 U.S. at 563. This right is fundamental and exists without regard to the social worth of the exchanged material. *Id.* at 564. In addition, although not explicitly guaranteed by the Constitution, the principles of substantive due process embodied in the Fifth and Fourteenth Amendments protect the right of privacy. *See, e.g., Lawrence*, 539 U.S. 558. This right is broad in scope and extends to various personal and intimate matters. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (the right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to marital privacy and contraception); *Rochin v. California*, 342 U.S. 165 (1952) (the right to bodily integrity); *Roe v. Wade*, 410 U.S. 113 (1973) (the right to an abortion).

Both the right to access information and the right of privacy are fundamental. In concluding that the private possession of obscenity could not be criminalized in *Stanley*, this Court expressly labeled the right to view even worthless material as "fundamental to our free society." *See Stanley*, 394 U.S. at 564, 568 (defining right to read and observe as "*fundamental* to our scheme of individual liberty") (emphasis added). Equally fundamental is the right of privacy inherent in the notion of substantive due process. *Id.* at 564 ("also *fundamental* is the right to be free, except in very limited

circumstances, from unwanted governmental intrusions into one's privacy") (emphasis added); *see also Lawrence*, 539 U.S. at 565 ("the protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person") (emphasis added).

This fundamental right of privacy, at least as it governs the right to autonomous decision-making, is not restricted to the home. From its inception, the right to privacy grounded in substantive due process has restrained the reach of government into the personal lives, and not just spaces, of the people. While the aegis of the right was in the home, the liberties guaranteed by substantive due process have moved out of the marital bedroom and into the public sphere of commercial interactions between consenting adults. As the Court observed in *Lawrence*:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And *there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds*.

Lawrence, 539 U.S. at 562 (emphasis added). Thus, this Court has explicitly recognized that the right of privacy is no longer confined -- if it ever was -- solely to the sanctity of the home. Rather, substantive due process protection extends to public activities that directly impact upon and influence private behavior. *See id.* at 562 ("liberty of the person [involves] both . . . spatial and more transcendental dimensions"); *see also Griswold*, 381 U.S. 479 (recognizing that the right to contraception includes not only the right of

married persons to use contraceptive devices, but also the right of the physician to dispense them).

These principles are not altered when the content of the material an individual elects to privately access and view is sexual in nature. In fact, if anything, the inclusion of sexual topics or activities heightens the constitutional concerns.[1] Because sexual behavior is "the most private human conduct," multiple constitutional protections are at work when an individual seeks to access sexually explicit speech in private. *Lawrence*, 539 U.S. at 567. The First Amendment protects the right to one's own ideas, while the Fifth and Fourteenth Amendments protect the privacy and liberty interests inherent in any sexual activity that occurs outside the public view. *See Stanley*, 394 U.S. at 565; *Lawrence*, 539 U.S. at 564.

The government's prosecution of Valeria Dave threatens to endanger the privacy rights of Texas consumers who access and purchase sexually explicit material from local retail outlets. Though there exists some public component to the purchase, the end result of these transactions is largely private, with an individual using his television or computer to view the material in the comfort of his own home. Because the place of consumption is wholly private, the entire transaction is entitled to constitutional protection. To permit Dave to be prosecuted for merely making obscene materials available would be to endanger the rights of individuals to privately access those materials. Substantive due process does not permit such a result.

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[1] This is due in part to the fact that, because obscenity is difficult to define, increased sensitivity is warranted when expression is involved. *See Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002).

B. The Court's prior holdings that there exists no right to distribute obscenity are no longer valid.

The state courts concluded that, despite the expansion of substantive due process rights in *Lawrence*, 539 U.S. 558, this Court has already resolved the issue of whether a ban on distribution of obscenity overly burdens the individual right to privately access and view obscenity. App. 8-9a. The courts below relied on five specific cases for this proposition: 1) *United States v. Reidel*, 402 U.S. 351 (1971); 2) *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); 3) *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973); 4) *United States v. 12 200-Ft. Reels*, 413 U.S. 123 (1973); and 5) *United States v. Orito*, 413 U.S. 139 (1973). App. 8-11a. None of these cases, however, specifically discussed the application of substantive due process protection to the exchange of obscenity. Moreover, the majority opinions in each case focused on whether there exists a corollary right to distribute obscene materials, and not whether a ban on such activities violates the personal right of possession.[2] In addition, there are key factual differences -- such as the role of border control in *12 200-Ft. Reels*, 413 U.S. at 128, or the fact that the film was shown in a public theater in *Paris Adult Theatre*, 413 U.S. at 50-51 -- that distinguish Dave's case from *Reidel* and its progeny.

Given these distinctions, Dave does not concede that this Court's cases conclusively resolve the issue as to whether the federal obscenity statutes unconstitutionally impinge upon the

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[2] The dissenting justices in *Thirty-Seven Photographs* and *Orito* did argue that prohibiting distribution of obscenity effectively eviscerates the right of individuals to view and access obscene works in their homes.

individual right of private access to obscene materials. To the extent that the post-*Stanley* cases do control the analysis here, however, there are substantial reasons for reconsidering their holding. Indeed, given that the cases relied upon by the state courts are more than thirty years old, and in light of society's changing and evolving views on privacy, the time has come for the Court to address again the constitutional protections afforded to those who privately transact obscene materials.

Two significant developments since *Reidel*, *Orito*, and *Paris Adult Theatre* were decided call the essential holdings of those cases into question. First, in the more than thirty years since the Court settled its post-*Stanley* jurisprudence, the Court has increasingly recognized the commercial aspect of free speech. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court rejected a speech/conduct distinction in the context of campaign finance reform. In the Court's view, there is no practical difference between actually speaking on the one hand and paying to produce, distribute, or obtain speech on the other. *Id.* at 15-20. The Court has been consistent in this approach as its campaign finance jurisprudence has developed. *See, e.g., FEC v. Beaumont*, 593 U.S. 146, 162 (2003). So too has the Court recognized the negative impact of economic disincentives in the adult entertainment context. In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2002), the Court found a law that limited the hours of certain sexually explicit broadcasts to be unconstitutional because of its perceived negative effect upon the economic viability of a single adult entertainment business. The Court struck down the law in question because it restricted the ability of the Playboy Channel to broadcast at certain times, with the result being a "significant restriction of communications, with a corresponding reduction in Playboy's revenues." *Id.* at 809. This newly emerging emphasis on economics undermines the

Court's previous rejection of a right to commercially distribute obscenity.

C. Morality is no longer a justification for criminalizing private consensual sexual activity.

In addition, the Court's decision in *Lawrence* at least raises the specter that morality is no longer a compelling -- or perhaps even a legitimate -- interest when government seeks to regulate private matters.[3] While the opinion in *Lawrence* does not disclose whether the Court viewed the right to sexual intimacy as a fundamental right entitled to strict scrutiny, or merely a basic right triggering rational basis review, the Court was clear that the morality justification raised by the state was insufficient to override the constitutional protection afforded to private sexual behavior.[4] *Lawrence*, 539 U.S. at

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[3] In addition to altering the Court's views of morality as a government interest, *Lawrence* also recognized the need to revisit matters of societal importance as preferences and viewpoints evolve. *See Lawrence*, 539 U.S. at 578-79 ("[T]hose who drew and ratified the Due Process Clauses of the Fifth and Fourteenth Amendment ... knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

[4] Several lower courts have read *Lawrence* as the latter, namely a case employing rational basis review because a non-fundamental right was at stake. *See, e.g., Williams v. Atty. Gen. of Alabama*, 378 F.3d 1232, 1236 (11th Cir. 2004). If this reading is correct, then Dave's assertion that *Lawrence* changed the governmental interest portion of substantive due process analysis is all the more correct. Because rational basis review requires only a legitimate government interest, as opposed to a compelling one, the fact that morality was insufficient to justify the anti-sodomy law strongly suggests that the government's interest in promoting morality is not even legitimate.

578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). This conclusion fundamentally alters the morality rationale that was outcome-determinative in *Paris Adult Theatre*. There, the Court relied heavily upon the government's interest in preserving "the quality of life and the total community environment" and in maintaining a "decent society" to justify obscenity citations against a public theater. *Paris Adult Theatre*, 413 U.S. at 58-59. So too was concern for public harm important in *Orito*. *Orito*, 413 U.S. at 143-44 ("Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil."). After *Lawrence*, the continuing validity of such a justification for obscenity prosecutions is in doubt.

In light of these developments, obscenity remains the one area where the Court has acknowledged a privacy interest, but refuses to recognize that an absolute ban on distribution impedes that interest. In contrast, other matters entitled to be decided autonomously, including whether to have an abortion or whether to use birth control, include a public component, such as consulting with a doctor or purchasing condoms in a drug store. *See Roe*, 410 U.S. 113 (striking Texas laws that made it a crime to provide an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating law that prohibited providing contraceptives to unmarried persons). Also tellingly, the Court has declined to carve out an exception for the private possession of marijuana for medicinal purposes, adhering to the principle that access to an item is either protected by the Constitution *in toto* or can be entirely banned. *See Gonzales v. Raich*, 545 U.S. 1 (2005). In no other sphere save obscenity does the dichotomy exist where it is lawful to possess, but not to obtain, the material in

dispute. It is therefore time for the Court to reconsider its post-*Stanley* cases.

An additional consideration warrants the Court's attention in this case, namely the precise meaning of Justice Scalia's observation in dissent in *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting): "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision." Absent additional explanation from the Court as to whether *Lawrence* entirely eviscerates the government's interest in morality in matters dealing with private decision-making, it remains uncertain the degree to which legislatures are free to impose their moral will on others. Thus, as the status of the law stands today, lower courts are without guidance as to whether Justice Scalia's observation was indeed apocalyptic or merely hyperbolic.

Given the important substantive due process interests at stake, the Court should rethink and refine its position regarding the constitutionality of criminalizing obscene speech.

CONCLUSION

For the reasons discussed in this Petition, the Court should issue a writ of certiorari to review the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

Wednesday, June 20, 2007
Re: Case No. PD-0698-07
COA#: 02-06-00092-CR
STYLE: DAVE, EX PARTE VALERIA JOYCE

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

APPENDIX B

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORTH WORTH

NO. 2-06-092-CR

[Filed March 15, 2007]

EX PARTE)
)
VALERIA JOYCE DAVE)
)

From County Criminal Court No. 2 of Tarrant County

ORDER

We have considered "Appellant's Motion for Rehearing."

It is the opinion of the court that said motion for rehearing should be and is hereby denied and that the opinion and judgment of February 22, 2007, stand unchanged.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

SIGNED March 15, 2007.

/s/
JOHN CAYCE
CHIEF JUSTICE

PANEL A: CAYCE, C.J.; DAUPHINOT and WALKER, JJ.

APPENDIX C

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-06-092-CR

[Filed February 22, 2007]

EX PARTE)
VALERIA JOYCE DAVE)
)

From County Criminal Court No. 2 of Tarrant County

JUDGES: PANEL A: CAYCE, C.J.; DAUPHINOT and WALKER, JJ.

OPINION

Appellant Valeria Joyce Dave appeals the trial court's order denying her application for writ of habeas corpus on the ground that the misdemeanor obscenity statute under which she is charged in the underlying case is facially unconstitutional. We affirm.

Appellant is an employee of Dreamer's, a sexually-oriented business in Kennedale, Texas. No one under the age of eighteen is allowed on the premises, and Dreamer's offers no on-premises entertainment. Instead, its customers may purchase videotapes and DVDs for off-premises viewing only.

The State alleges that appellant sold two videotapes containing obscene materials to two different undercover police officers. Thereafter, appellant was charged with two counts of promoting obscenity.

Section 43.23 of the Texas Penal Code provides that a person commits an offense if, knowing its content and character, she "promotes or possesses with intent to promote any obscene material or obscene device."[1]

In her issue on appeal, appellant argues that the trial court improperly denied her request for habeas relief because

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[1] TEX. PENAL CODE ANN. § 43.23(c)(1) (Vernon Supp. 2006). "Promote" includes selling or offering or agreeing to sell. *Id.* § 43.21(a)(5) (Vernon 2003). "Obscene" means material that

> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
>
> (B) depicts or describes:
>
> (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
>
> (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, and scientific value. *Id.* § 43.21(a)(1).

section 43.23 unconstitutionally restricts the right of privacy embodied in the Due Process Clause of the Fourteenth Amendment.[2] Appellant contends that the First Amendment protects an individual's right to privately possess and view obscene materials, and the Fourteenth Amendment protects a merchant's right to sell those materials at a sexually-oriented business such as Dreamer's, where no one under age eighteen is allowed in the store, and the materials sold there are not viewed on the premises. Appellant further contends that these rights are fundamental constitutional rights.

A criminal defendant may challenge the facial constitutionality of a statute via a pretrial application for writ of habeas corpus.[3] When we are confronted with an attack on the constitutionality of a statute, we presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily.[4] The burden rests on the individual who challenges the statute to establish its unconstitutionality.[5]

A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the

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[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST., amend. XIV, § 1.

[3] *Ex parte Weise,* 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

[4] *Rodriguez v. State,* 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

[5] *Id.*

statute will be valid.[6] Since a statute may be valid as applied to one set of facts and invalid as applied to another, the challenger must first show that the statute is unconstitutional as applied to her in her situation.[7] That the statute may be unconstitutional as applied to others is insufficient to support a facial challenge.[8]

State statutes designed to regulate obscene material must be carefully limited,[9] because the First and Fourteenth Amendments prohibit making an individual's private possession of obscene material a crime.[10] Obscene material itself, however, is not protected by the First Amendment.[11]

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[6] *Santikos v. State,* 836 S.W.2d 631, 633 (Tex. Crim. App.), *cert. denied,* 506 U.S. 999, 121 L. Ed. 2d 537, 113 S. Ct. 600 (1992); *Butler v. State,* 162 S.W.3d 727, 731 (Tex. App.—Fort Worth 2005), *aff'd,* 189 S.W.3d 299 (2006); *see Gillenwaters v. State,* 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006) ("A claim that a statute is unconstitutional 'on its face' is a claim that the statute, by its terms, always operates unconstitutionally.") (quoting *Tex. Boll Weevil Eradication Found. v. Lewellen,* 952 S.W.2d 454, 461 n.5, 40 Tex. Sup. Ct. J. 523 (Tex. 1997)).

[7] *Santikos,* 836 S.W.2d at 633.

[8] *Id.; Butler,* 162 S.W.3d at 731.

[9] *Miller v. California,* 413 U.S. 15, 23-24, 93 S. Ct. 2607, 2614, 37 L. Ed. 2d 419 (1973).

[10] *Stanley v. Georgia,* 394 U.S. 557, 568, 89 S. Ct. 1243, 1249, 22 L. Ed. 2d 542 (1969).

[11] *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 69, 93 S. Ct. 2628, 2641, 37 L. Ed. 2d 446 (1973); *Roth v. United States,* 354 U.S. 476, 486, 77 S. Ct. 1304, 1309, 1 L. Ed. 2d 1498 (1957); *see*

Thus, the constitutionally-protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to sell or give it to others,[12] nor does it require the courts to fashion or recognize a right to distribute such material.[13]

Indeed, "commerce in obscene material is unprotected by any constitutional doctrine of privacy."[14] Consequently, the Supreme Court has held that "the States have a legitimate interest in regulating commerce in obscene material"[15] and has consistently and explicitly upheld the constitutionality of

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Miller, 413 U.S. at 23, 93 S. Ct. at 2614 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

[12] *United States v. 12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. 123, 128, 93 S. Ct. 2665, 2669, 37 L. Ed. 2d 500 (1973); *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 376, 91 S. Ct. 1400, 1408, 28 L. Ed. 2d 822 (1971); *United States v. Coil,* 442 F.3d 912, 916 (5th Cir. 2006), *petition for cert. filed,* 75 U.S.L.W. 3397 (U.S. June 12, 2006) (No. 06-980); *see also T.K.'s Video, Inc. v. State,* 891 S.W.2d 287, 289 (Tex. App.—Fort Worth 1994, pet. ref'd) (holding that, while an individual has a right to possess obscene material in the privacy of his home, there is no corresponding privacy right to purchase such material).

[13] *United States v. Reidel,* 402 U.S. 351, 356, 91 S. Ct. 1410, 1412-13, 28 L. Ed. 2d 813 (1971); *Coil,* 442 F.3d at 916.

[14] *Paris Adult Theatre I,* 413 U.S. at 69, 93 S. Ct. at 2642.

[15] *Id.,* 93 S. Ct. at 2642.

statutes regulating the distribution of obscenity.[16] Legitimate state interests include "stemming the tide of commercialized obscenity"[17] in order to protect the public quality of life, the community environment, and the social interest in order and morality.[18] An obscenity statute is constitutional if it is

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[16] *See United States v. Orito,* 413 U.S. 139, 140, 143, 93 S. Ct. 2674, 2676, 2678, 37 L. Ed. 2d 513 (1973) (upholding the constitutionality of a federal statute criminalizing the knowing, interstate transportation of obscene material, even if the transportation is by private carriage or intended for the transporter's private use); *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. at 129, 93 S. Ct. at 2669 (upholding the constitutionality of a federal statute prohibiting the importation of obscene material, even if it is for the importer's private, personal use and possession); *Thirty-Seven (37) Photographs,* 402 U.S. at 376, 91 S. Ct. at 1408 (same, but in circumstances involving both intended private use and public distribution); *Paris Adult Theatre I,* 413 U.S. at 69, 93 S. Ct. at 2642 (upholding the constitutionality of a Georgia statute prohibiting the knowing distribution of obscene material at an "adult" movie theater); *Reidel,* 402 U.S. at 352, 91 S. Ct. at 1411 (upholding the constitutionality of a federal statute that prohibits the mailing of obscene material to willing recipients who state they are adults).

[17] *Paris Adult Theatre I,* 413 U.S. at 57, 93 S. Ct. at 2635.

[18] *Id.* at 57-58, 93 S. Ct. at 2635; *Roth,* 354 U.S. at 485, 77 S. Ct. at 1309; *Yorko v. State,* 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985). The State laws must meet the First Amendment standards set out in *Miller v. California,* which holds that the prohibited conduct must be specifically defined and a state offense must be limited to works "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. at 24, 93 S. Ct. at 2615; *see Paris Adult Theatre I,* 413 U.S. at 69, 93 S. Ct. at 2642 (holding

rationally related to the government's advancement of these interests.[19]

In this case, the protection of these interests is at stake, even though Dreamer's has safeguards in place to protect against exposure to juveniles and passersby.[20] Allowing the sale of obscene material would adversely affect the public quality of life by creating the potential for widespread dissemination of obscene material into the community.[21] Further, once the material leaves Dreamer's premises, there is no way to ensure that it will, as appellant suggests, be

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same). Appellant does not argue that the Texas obscenity statute—which tracks the language in *Miller*—fails to meet these standards. *See supra* n.1.

[19] *Vacco v. Quill,* 521 U.S. 793, 809, 117 S. Ct. 2293, 2302, 138 L. Ed. 2d 834 (1997); *United States v. Extreme Assocs., Inc.,* 431 F.3d 150, 153 n.7 (3rd Cir. 2005), *cert. denied,* 126 S. Ct. 2048, 164 L. Ed. 2d 806 (2006).

[20] *See Paris Adult Theatre I,* 413 U.S. at 57, 93 S. Ct. at 2635 ("categorically disapprov[ing] the theory . . . that obscene pornographic films require constitutional immunity from state regulation simply because they are exhibited for consenting adults only"). We reject appellant's argument that Dreamer's is a private, rather than public, place simply because no one under eighteen is allowed in the store and none of the material it sells can be viewed on the premises. Dreamer's is a commercial establishment open to the public, and any person over age eighteen who so desires can purchase obscene material there.

[21] "Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." *Id.* at 59, 93 S. Ct. at 2636.

viewed only by a consenting adult in the privacy of his home. Instead, there is a very real danger that it could be given to or viewed by a juvenile or a nonconsenting adult.[22] The States may regulate based on the natural tendency that obscene material kept in a private area will not remain so once it leaves that area.[23]

Appellant recognizes these well-established authorities, but argues that they address only challenges brought under the First Amendment and not under the Due Process Clause of the Fourteenth Amendment. We disagree. The Supreme Court in *Paris Adult Theatre I* addressed the scope of the right to privacy guaranteed by the Fourteenth Amendment and concluded that it does not protect the sale or other distribution of obscene material.[24] In light of this clear pronouncement,

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[22] *See id.* at 57-58 n.7, 93 S. Ct. at 2635 n.7 (stating that the legitimate interest in preventing juvenile exposure to material sold at "adult" bookstores cannot be fully served by barring juveniles from the premises, based on studies showing that, although most pornography may be bought by adults, adolescent males and females and young adult males were "the heavy users and most highly exposed").

[23] *Orito,* 413 U.S. at 143, 93 S. Ct. at 2678.

[24] *Paris Adult Theatre I,* 413 U.S. at 65, 93 S. Ct. at 2639 ("Our prior decisions recognizing a *right to privacy under the Fourteenth Amendment* included only *personal* rights that can be deemed fundamental or implicit in the concept of ordered liberty.") (emphasis supplied, citations omitted); *id.* at 69, 93 S. Ct. at 2642 ("We have also reaffirmed . . . that commerce in obscene material is unprotected by any constitutional doctrine of privacy.") (citing *Orito,* 413 U.S. at 143, 93 S. Ct. at 2678; *12 200-Ft. Reels of Super 8mm. Film,* 413 U.S. at 129, 93 S. Ct. at 2669; *Reidel,* 402

we hold that the sale of obscene material is not protected by the Due Process Clause of the Fourteenth Amendment.[25]

Appellant also argues that, since *Paris Adult Theatre I, Orito*, and *Reidel* were decided, the Supreme Court has, in *Lawrence v. Texas,*[26] expanded the right to privacy embodied in the Due Process Clause of the Fourteenth Amendment "into the public sphere of commercial transactions between consenting adults." *Lawrence* did not, however, involve the sale or distribution of obscene materials, and it is completely inapposite to this case. It holds only that the right to liberty embodied in the Due Process Clause protects private, consensual sexual conduct between homosexuals from governmental intrusion.[27] Further, appellant's argument is directly contradicted by *Lawrence* itself, which expressly states that this right "does not involve public conduct."[28]

U.S. at 356, 91 S. Ct. at 1412-13; *Thirty-Seven (37) Photographs,* 402 U.S. at 376, 91 S. Ct. at 1408).

[25] *See Coil,* 442 F.3d at 917 (stating that *Stanley* and its progeny, including *Paris Adult Theatre I,* "uphold[] the constitutionality of the obscenity laws against attacks on both the First Amendment and substantive due process"); *Extreme Assocs., Inc.,* 431 F.3d at 157 (rejecting the argument that *Paris Adult Theatre I, Orito,* and *Reidel* dealt only with a First, and not a Fourteenth, Amendment concept of privacy merely because the phrase "substantive due process" was not used in their holdings).

[26] 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

[27] *Id.* at 578, 123 S. Ct. at 2483-84 (holding unconstitutional the Texas statute criminalizing deviate sexual intercourse with another individual of the same sex).

[28] *Id.,* 123 S. Ct. at 2484.

Morever, the Supreme Court has commanded, "[i]f a precedent of this court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[29] The Court later reaffirmed this command, stating, "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."[30]

In *Paris Adult Theatre I,* the Supreme Court upheld as constitutional a Georgia obscenity statute virtually identical to the Texas obscenity statute at issue here.[31] The Supreme

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[29] *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989).

[30] *Agostini v. Felton,* 521 U.S. 203, 237, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997).

[31] The Georgia statute provided as follows:

> A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with intent so to do . . . .

See Paris Adult Theatre I, 413 U.S. at 51 n.1, 93 S. Ct. at 2632 n.1.

The Texas obscenity statute provides in pertinent part as follows: "A person commits an offense if, knowing its content and character, he: (1) promotes or possesses with intent to promote any

Court has also held that States may prohibit the sale of obscenity in order to protect the public quality of life and the social interest in order and morality.[32] This Supreme Court precedent has direct application to appellant's case and has not been overruled by *Lawrence* or any other Supreme Court decision. Therefore, we decline to hold section 43.23 unconstitutional based on *Lawrence*.[33]

For all these reasons, we hold that there is no constitutionally-protected right, under either the First or the

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obscene material . . . ." TEX. PENAL CODE ANN. § 43.23(c)(1). "Promote" means "to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." *Id.* § 43.21(a)(5).

[32] *Paris Adult Theatre I,* 413 U.S. at 57-58, 93 S. Ct. at 2635; *Roth,* 354 U.S. at 485, 77 S. Ct. at 1309. "There is a 'right of the Nation and of the States to maintain a decent society . . . .'" *Paris Adult Theatre I,* 413 U.S. at 59, 93 S. Ct. at 2636; *see also Yorko,* 690 S.W.2d at 265 (holding, based on *Paris Adult Theatre I* and *Roth,* that it is "appropriate for the State to act to protect the 'social interest in order and morality' or 'decency'"); *Extreme Assocs., Inc.,* 431 F.3d at 154, 159 n.12 (rejecting the argument that prohibiting commerce in obscene material to uphold the public sense of morality is not a legitimate state interest after *Lawrence*).

[33] *See Coil,* 442 F.3d at 916-17; *Extreme Assocs., Inc.,* 431 F.3d at 155-58 (both refusing, based on *Rodriguez de Quijas* and *Agostini,* to apply *Lawrence* to overrule well-established federal case law upholding the constitutionality of statutes regulating the distribution of obscenity).

Fourteenth Amendment, to sell obscene material,[34] and that the State has a legitimate interest in regulating commerce in obscene material. We further hold that section 43.23, which prohibits the sale of obscene material, is rationally related to the government's advancement of this legitimate interest. Accordingly, section 43.23 is both facially constitutional and constitutional as applied to appellant. Therefore, we overrule appellant's issue and affirm the trial court's order denying habeas relief.

/s/
JOHN CAYCE
CHIEF JUSTICE

PANEL A: CAYCE, C.J.; DAUPHINOT and WALKER, JJ.

PUBLISH

DELIVERED: February 22, 2007

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[34] Because there is no constitutional right to sell obscene material, appellant's argument that such a right is "fundamental" fails.

APPENDIX D

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-06-092-CR

[Filed February 22, 2007]

EX PARTE)
VALERIA JOYCE DAVE)
)

From County Criminal Court No. 2
of Tarrant County (1012258)
February 22, 2007
Opinion by Chief Justice Cayce

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in the order of the trial court. It is ordered that the order of the trial court is affirmed.

Appellant Valeria Joyce Dave shall pay all costs of appeal, for which let execution issue.

/s/ John Cayce

APPENDIX E

COUNTY CRIMINAL COURT
NUMBER TWO
TARRANT COUNTY, TEXAS

NO. 1012258

[Filed February 28, 2006]

STATE OF TEXAS	)
	)
VS.	)
	)
VALERIA JOYCE DAVE	)
	)

ORDER

On the 22nd day of February, 2006, Defendant's Application for Writ of Habeas Corpus was heard. After considereing the evidence, and the argument of counsel, the Court is of the opinion that the Application for Writ of Habeas Corpus should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Application for Writ of Habeas Corpus is **denied**.

Signed this 28th day of February, 2006.

/s/ _____
Judge Presiding

APPENDIX F

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

[Filed July 24, 2007]

MANDATE

THE STATE OF TEXAS

To County Criminal Court No. 2 of Tarrant County, Greetings:

On February 22, 2007 the Court of Appeals for the Second District of Texas affirmed your judgment in the following case:

Ex Parte Valeria Joyce Dave, No. 02-06-092-CR (trial court no. 1012258)

The Court of Appeals enetered the following judgment or order:

> This court has considered the record on appeal in this case and holds that there was no error in the order of the trial court. It is ordered that the order of the trial court is affirmed. Appellant Valeria Joyce Dave shall pay all costs of appeal, for which let execution issue.

Accordingly, we command you to observe the order of the Court of Appeals.

BY ORDER OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS, with the seal thereof annexed, at the City of Forth Worth, on July 24, 2007.

STEPHANIE ROBINSON, CLERK

By /s/
Deputy Clerk

APPENDIX F

Vernon's Texas Statutes and Codes
Title 9. Offenses Against Public Order and Decency
Chapter 43. Public Indecency
Subchapter B. Obscenity

V.T.C. § 43.21. Definitions

(a) In this subchapter:

(1) "Obscene" means material or a performance that:
(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
(B) depicts or describes:
(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or
(ii) patently offensive representation or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genetials, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a descernibly turgid state or a device designed and marketed as useful primarily for stimulation of te human genital organs; and
(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.
(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through

the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(6) "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribure, circulate, disseminate, or to offer or agree to to the same for purpose of resale.

(7) "Obscene device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(b) If any of the depictions or descriptions of sexual conduct described in this section are declared by a court of competent jurisdiction to be unlawfully included herein, this declaration shall not invalidate this section as to other patently offensive sexual conduct included herein.

V.T.C. § 43.22. Obscene Display or Distribution

(a) A person commits an offense if he intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person is present who will be offended or alarmed by the display or distribution.

(b) An offense under this section is a Class C misdemeanor.

V.T.C. § 43.23. Obscenity

(a) A person commits an offense if, knowing its content and character, he wholesale promotes or possesses with intent to wholesale promote any obscene material or obscene device.

(b) Except as provided by Subsection (h), an offense under Subsection (a) is a state jail felony.

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) Except as provided by Subsection (h), an offense under Subsection (c) is a Class A misdemeanor.

(e) A person who promotes or wholesale promotes obscene material or an obscene device or possesses the same with intent to promote or wholesale promote it in the course of his business is presumed to do so with knowledge of its content and character.

(f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

(g) It is an affirmative defense to prosecution under this section that the person who possesses or promotes material or a device proscribed by this section does so for a bona fide

medical, psychiatric, judicial, legislative, or law enforcement purpose.

(h) The punishment for an offense under Subsection (a) is increased to the punishment for a felony of the third degree and the punishment for an offense under Subsection (c) is increased to the punishmnet for a state jail felony if it is shown on the trial of the offense that obscene material that is the subject of the offense visually depicts activiites described by Section 43.21(a)(1)(B) engaged in by:

(1) a child younger than 18 years of age at the time the image of the child was made;

(2) an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age; or

(3) an image created, adapted, or modified to be the image of an identifiable child.

(i) In this section, "identifiable child" means a person, recognizable as an actual person by the person's face, likeness or other distinguishing characteristic, such as a unique birthmark or other recobnizable feature:

(1) who was younger than 18 years of age at the time the visual depiction was created, adapted, or modified; or

(2) whose image as a person younger than 18 years of age was used in creating, adapting, or modifying te visual depiction.

(j) An attorney representing the state who seeks an increase in punishment under Subsection (h)(3) is not required to prove the actual identity of an identifiable child.